IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-5491

JAMES TYRONE WOODSON AND LUBY WAXTON,
Petitioners,

v.

STATE OF NORTH CAROLINA,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NORTH CAROLINA

BRIEF FOR PETITIONERS

EDWARD H. McCORMICK
Post Office Box 38
Lillington, North Carolina 27546

W. A. JOHNSON
Post Office Box 146
Lillington, North Carolina 27546

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

JACK GREENBERG
JAMES M. NABRIT, III
PEGGY C. DAVIS
DAVID E. KENDALL
BILL LANN LEE
10 Columbus Circle
New York, New York 10019

ADAM STEIN
CHARLES L. BECTON
Chambers Stein Ferguson & Becton
157 East Rosemary Street
Chapel Hill, North Carolina 27514

ATTORNEYS FOR PETITIONERS

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OPINION BELOW

The opinion of the Supreme Court of North Carolina affirming petitioner's convictions of first degree murder and sentences of death by lethal gas is reported at 287 N. C. 578, 215 S. E. 2d 607 (1975). The judgments of the Superior Court of Harnett County finding petitioners guilty and sentencing them to die are unreported.[1] They appear at R. 148, 153.

[1] As of the time of the filing of this brief, the record below has not been printed as an appendix. References to the 165-page record will hereinafter be prefaced by "R".

JURISDICTION

The jurisdiction of this Court rests upon 28 U. S. C. § 1257 (3) (1970), the petitioners having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of North Carolina was entered on June 28, 1975. The petition for certiorari was filed on September 24, 1975, and was granted on January 22, 1976.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It also involves the Due Process Clause of the Fourteenth Amendment.

It further involves N. C. Gen. Stat. §§ 14–17, 14–32, 14–87 (repl. vol. 1969), and N. C. Gen. Stat. §§ 15–176.3, 15–176.4, 15–176.5, 15–187, 15–188 (repl. vol. 1975):

> § 14–17 (1974 cum. Supp.): *"Murder in the first and second degree defined; punishment.*—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment of not less than two years nor more than life imprisonment in the State's prison."

> § 14–32 (1974 cum. Supp.): *"Felonious assault with deadly weapon with intent to kill or inflicting serious injury;; punishments.*—
>
> "(a) Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury is guilty of a felony punishable by a fine, imprisonment for not more than 20 years, or both such fine and imprisonment.
>
> "(b) Any person who assaults another person with a deadly weapon and inflicts serious injury is guilty of a felony punishable by a fine, imprisonment for not more than 10 years, or both such fine and imprisonment.
>
> "(c) Any person who assaults another person with a deadly weapon with intent to kill is guilty of a felony punishable by a fine, imprisonment for not more than 10 years, or both such fine and imprisonment."
>
> § 14–87: *"Robbery with firearms or other dangerous weapons.*—Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time either day or night, or who aids or abets any such person or persons in the commission of such crime shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years."
>
> § 15–176.3: *"Informing and questioning potential jurors on consequences of guilty verdict.*—When a jury is being selected for a case in which the de-

fendant is indicted for a crime for which the penalty is a sentence of death, the court, the defense, or the State may inform any person called to serve as a potential juror that the death penalty will be imposed upon the return of a verdict of guilty of that crime and may inquire of any person called to serve as a potential juror whether that person understands the consequences of a verdict of guilty of that crime."

§ 15–176.4: *"Instructions to jury on consequences of guilty verdict.*—When a defendant is indicted for a crime for which the penalty is a sentence of death the court upon request by either party, shall instruct the jury that the death penalty will be imposed upon the return of a verdict of guilty of that crime."

§ 15–176.5: *"Argument to jury on consequences of guilty verdict.*—When a case will be submitted to a jury on a charge for which the penalty is a sentence of death, either party in its argument to the jury may indicate the consequences of a verdict of guilty of that charge."

§ 15–187: *"Death by administration of lethal gas.*—Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor."

§ 15–188: *"Manner and place of execution.*—The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the

walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article."

QUESTION PRESENTED

Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Following a jury trial in the Superior Court of Harnett County, North Carolina, petitioners James Tyrone Woodson and Luby Waxton were sentenced to death for the first degree murder of Mrs. Shirley Whittington Butler.[2] Mrs. Butler was killed on June 3, 1974; selection of petitioners' jury began[3] on December 3, 1974;[4] petitioners were convicted and sentenced on December 9, 1974.

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[2] At this trial, petitioners were also convicted of the armed robbery of Mrs. Butler, but judgment on the armed robbery verdicts was arrested because the same armed robbery was the predicate felony of the first degree murder convictions under the State's felony-murder theory. (R. 149, 155–156.) Petitioner Waxton was simultaneously convicted of assault with a deadly weapon with intent to kill Mr. R. N. Stancil during the robbery. He was sentenced to a term of 20 years imprisonment upon the latter conviction. (R. 153–154.)

[3] Over the objection of defense counsel, a number of veniremen were excluded for cause on account of conscientious scruples against the death penalty. (R. 32–35.) The *voir dire* examination of these veniremen was not transcribed and was not a part of the record transmitted to the Supreme Court of North Carolina.

[4] Petitioners' pretrial motions to dismiss and quash the indictments on the ground that North Carolina's death penalty for murder violated the Eighth and Fourteenth Amendments to the

The State's case against petitioners consisted primarily of the testimony of two codefendants, Leonard Maurice Tucker [hereafter designated Tucker] and Johnnie Lee Carroll [5] [hereafter designated Carroll].[6]

Constitution of the United States had been denied (see pp. 18–19, *infra*), and petitioner Waxton had apparently been found mentally competent to stand trial following proceedings which the record leaves unclear. On July 30, 1974, the trial court had ordered a psychiatric examination for Waxton (R. 8–9); the results of this examination do not appear in the record; but on November 4, 1974, the court again ordered petitioner Waxton examined (R. 20–24), observing that defense counsel had indicated the presence of "a nervous condition which made it difficult for him to communicate with the" petitioner. (R. 21.)

"The Court from its own observation notices a difference in the apparent nervous condition and the ability to communicate of the [petitioner] . . . from his appearance in court on last Tuesday and is of the opinion that further determination should be made of the [petitioner's] . . . physical and mental condition to communicate with his counsel and to participate in his defense."

(*Ibid.*; *see also* R. 23.) No subsequent proceedings on the subject appear in the record.

[5] Another person named Carroll appears from time to time in the record: *George Willie* Carroll, a brother (or half-brother) of petitioner Luby Waxton and of co-defendant Johnnie Lee Carroll. George Willie Carroll testified for the prosecution that he had lent his car to his brothers on the evening of the robbery that resulted in Mrs. Butler's death (R. 53); his car was used by them in the robbery (see, *e. g.*, R. 45)); but George Willie Carroll was not criminally implicated. Since the relevant facts of the case can be described without reference to him, we shall not mention him by name hereafter, and shall use "Carroll" to refer exclusively to Johnnie Lee Carroll.

[6] Although the State introduced the testimony of twelve other witnesses and various exhibits, none of this evidence linked the two petitioners to the crime except indirectly through the testimony of Tucker and Carroll. The State's only nonaccomplice eyewitness, Mr. R. N. Stancil, did not place petitioners on the scene. He testified that he lived across the street from the E–Z Shop, which was operated by Mrs. Butler. (R. 52.) He entered the shop about 10:15 p. m. on June 3, 1974, to buy a soft drink and noticed that Mrs. Butler "was not in her place." (*Ibid.*) Mr. Stancil "met someone coming out who seemed to be in a hurry and went by me. I saw something on the floor and I was going to pick it up when I heard an explosion. The person I had just met said something like 'look out' . . . . After the explosion I felt pain in my back . . . and saw blood coming off my arm . . . .

"I can't identify the person I saw coming out of the E–Z Shop and I did not see Mrs. Butler." (*Ibid.*)

Of the remaining 11 State's witnesses, three were police officers who examined the scene at the E–Z store following th robbery and murder, and who gathered certain physical evidence (R. 36–38) [one of these officers also described Tucker's postarrest confession for the purpose of corroborating Tucker's trial testimony (R. 37)]; two testified as to the chain of custody of physical evidence (R. 52–53); one was a fingerprint expert who testified that Tucker's prints were on a package of Kool cigarettes found in the E–Z Shop (R. 51); one was a pathologist who testified that Mrs. Butler had been killed by a gunshot wound in the head, that there was powder and unburned material around the wound, and that State's Exhibit No. 6 consisted of bullet fragments retrieved from the wound (R. 44); one was a firearms expert who testified concerning the essentially inconclusive ballistics tests that he performed on State's Exhibit No. 6 and on the bullet recovered from Mr. Stancil's arm (R. 56–57); one was a police officer who described Carroll's postarrest confession for the purpose of corroborating Carroll's trial testimony, and who also identified State's Exhibit No. 9, a money tray taken from the E–Z Shop (R. 54–56) that Carroll had buried and to which he led the police after his arrest (R. 46, 55); and two testified concerning the loan of the robbery car by Carroll's brother, n. 5, *supra* (R. 53, 54).

[7] The pleas were accepted and entered on December 2, 1974, the sentences imposed on December 9, 1974. Tucker was sentenced to 10 years imprisonment on his plea of guilty to a charge of accessory after the fact to murder, *State* v. *Leonard Maurice Tucker*, Harnett County Super. Ct. No. 74–CR–5050 (December 9, 1974), and to not less than 20 nor more than 30 years imprisonment on his plea of guilty to a charge of armed robbery, *State* v. *Leonard Maurice Tucker*, Harnett County Super. Ct. No. 74–CR–5051 (December 9, 1974), the sentences to run concurrently. Carroll was

Tucker and Carroll had been indicted for first degree murder and armed robbery with petitioners, but had pleaded guilty to lesser offenses prior to petitioners' trial and were sentenced to terms of imprisonment.[7]

Tucker's and Carroll's accounts were essentially similar. Tucker testified that he and petitioner Woodson were together between 11:00 a. m. and 5:00 p. m. on June 3, 1974, drinking wine. (R. 39.) Woodson declared that "he did not want any part of the robbery" (R. 44; see also R. 43), that they had been discussing with Carroll and petitioner Waxton for the past few days.[8]

Waxton came to Tucker's trailer about 9:30 p. m. and asked where Woodson was. Tucker said Woodson was "uptown," and Waxton told Tucker to come with him. (R. 39, 43.) Waxton preceded Tucker to Woodson's trailer, a block away, where Tucker saw that Waxton "had Woodson backed up against Woodson's trailer." (R. 43.) Waxton hit Woodson in the face and told him that he was going to go along with them. (R. 39.) According to Tucker, Waxton told Woodson that "if he didn't come—if he didn't kill him I [Tucker] would." (*Ibid.*) Woodson's eye was "bleeding a little bit and was swollen," and he put his hand over it and accompanied the other two men. (R. 43.)

The three proceeded to Waxton's trailer where they met Carroll (R. 39, 45), who had borrowed his brother's car for the evening (R. 45). Woodson told Carroll that Waxton hit him because he, Woodson, was drunk;[9]

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sentenced to 10 years imprisonment on his plea of guilty to a charge of accessory after the fact to armed robbery, *State* v. *Johnnie Lee Carroll*, Harnett County Super. Ct. No. 74–CR–4994 (December 9, 1974), and to 10 years imprisonment on his plea of guilty to a charge of accessory after the fact to murder, *State* v. *Johnnie Lee Carroll*, Harnett County Super. Ct. No 74–CR–4995 (December 9, 1974), the sentences to run consecutively.

[8] Tucker testified that "[a]bout a week before the 3rd of June Luby [Waxton] told Tyrone [Woodson] and me he wanted to rob something. That is the only time I heard Luby make statements concerning robbing the place." (R. 41.)

[9] Carroll testified that "I could tell that Woodson had been drinking." (R. 50.)

Carroll got him a towel to put over his eye. (R. 39, 43, 45.) Inside the trailer, Waxton took a nickel-plated derringer from a cabinet[10] and put it in his pocket. (R. 39.) Tucker took a .22 caliber automatic rifle from the couch and handed it to Woodson. (R. 39, 43.) According to Tucker, Woodson had not asked for the rifle: "Luby was giving all the orders." (R. 43; see also R. 49.) According to Carroll, "[w]hen Woodson took the gun from Tucker, he said he was going to show him that he wasn't drunk." (R. 47.)

The four men got into Carroll's brother's car; Carroll drove, Woodson sat beside him on the front seat; Waxton and Tucker sat in the back seat. (R. 39.) Waxton declared that they were going to rob the E–Z Shop, but when they arrived they found customers there and drove on past the store. (R. 39.) They stopped the car briefly and, at Waxton's direction, Woodson test-fired the rifle by shooting it into the ground twice. (R. 39–40, 43, 45, 47.)[11]

They then returned and parked near the store. "Up until the last minute Waxton had instructed Woodson to go in but [he] changed his mind" (R. 44), and so Tucker accompanied Waxton into the store while Carroll and Woodson remained in the car with the rifle in the front seat.[12] (R. 40.) "Waxton told Woodson not to let anybody in the store," and Woodson said nothing in

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[10] Although Carroll had previously seen Waxton with a "silver Derringer," he did not see any pistol in Waxton's possession on the night of the crime. (R. 46.)

[11] Petitioner Woodson testified, on cross-examination, that "[w]hen we got there [to the E–Z Shop] we drove on by because too many people were in the store. I didn't test-fire the rifle and I don't remember anybody getting out of the car." (R. 104.) See pp. 13–14, n. 16, 17, *infra*.

[12] According to Tucker, "the rifle was on the floor of the front seat and not in Woodson's hands." (R. 43.) See also R. 40. Carroll testified that Woodson had earlier held the rifle "in his hand" when the four first left the Waxton trailer in the car. (R. 45.) See also p. 10, n. 14, *infra*.

response. (R. 43.) Inside the store, Tucker asked Mrs. Butler for a package of Kool cigarettes. She gave them to him and he paid her. (R. 40.) He moved down the counter, and Waxton also asked for a package of Kools. "[T]he woman handed them to him and Luby then reached into his pocket, pulled out the Derringer, stuck it around or about the left side of her neck and fired one shot." (*Ibid.*) Waxton then leapt over the counter and lifted the money tray from the cash register. (*Ibid.*) He put it on the counter, where Tucker picked it up and took it out of the store. (R. 40.)[13] As Tucker walked out the door, he passed R. N. Stancil (R. 40), who was entering the store to make a purchase (R. 52). Tucker "told him to look out and [I] kept walking toward the car. Then I heard a second shot from inside the store. I got in the car and about a couple of minutes after the second shot Luby came out of the store walking fast with some paper money in his hand." (R. 40; see also R. 45.)[14] The men drove to Waxton's mother's house (where Carroll, Waxton's half-brother lived (R. 45, 46)), and, on the way, Waxton said that "he shot the man in the back" in the store (R. 40).

At the house, Tucker and Waxton counted the money in the bathroom: "[t]here was about $280 and Luby kept it." (*Ibid.*) Carroll put the rifle and the money tray in the pantry (R. 45, 46), and, a few hours later, removed the money tray at Waxton's direction (R. 46, 48) and buried it under the house (*ibid.*). On June 4, Waxton and Woodson flew to Newark, New Jersey, where they were subsequently apprehended. (R. 102–103.)

On cross-examination, Tucker admitted that he had

[13] Carroll saw Tucker emerge from the store carrying the money tray. (R. 45.)

[14] Carroll testified that "Woodson saw Stancil first. He did not stop him. Woodson got out of the car with the rifle and I pulled him back into the car and told him to put the rifle down." (R. 48.)

pleaded guilty to lesser charges "in an attempt to save myself." (R. 42.) "I was told that I would have to testify against Luby Waxton and I agreed to do that in return for the State Attorney to accept a lesser plea." (*Ibid*). Tucker stated that he "was afraid of Waxton" (R. 43), but added that "Waxton didn't threaten any of us" (R. 44) to force them to participate in the robbery. Likewise, Carroll testified that "[i]t is true that I have made a trade to save my own life . . . I agreed to come up here and testify in order to save my own neck." (R. 47.) He added that Woodson "and Tucker went willingly and did whatever they did willingly" (*ibid.*), and that he himself "participated in the crimes on my own; Luby did not make me." (R. 48.)

At the close of the State's evidence, a hearing was held in the absence of the jury[15] at which petitioner

[15] Just before this *in camera* hearing was held, the following exchange occurred. The trial court had denied petitioners' motions for a mistrial based on certain discrepancies between the trial testimony of prosecution witnesses and a summary previously furnished to defense counsel; counsel for the petitioner Woodson renewed the motion; and the solicitor responded (the solicitor is also called the "district attorney" (R. 4, 6, 12, 17, 26; *but see* R. 1, 5, 7)):

"MR. TWISDALE [solicitor]: . . . Your Honor, I would like to state for the record that Mr. McCormick and I have had several pleading negotiations sessions. I met him at least twice in his office and at least one time up here and I have just as much idea of his client entering pleas Monday morning as I did Max McLeon [Tucker's attorney] or Sammy Stephenson [Carroll's attorney] and I say pleas of guilty.

"MR. McCORMICK [counsel for petitioner Woodson]: I'm sorry I didn't catch that. Are you saying that we indicated that we were going to plead guilty?

"MR. TWISDALE: Yes, sir.

"MR. McCORMICK: I'd like to say that I have never stated that to Mr. Twisdale, I have told him that I would make certain recommendations to my client and I have consistently told him that Woodson says he was not guilty.

"MR. TWISDALE: I am saying, your Honor as a result of our discussion I was under as much impression that pleas of not guilty

Waxton tendered a guilty plea to charges of armed robbery and accessory after the fact to murder. Petitioner Waxton's counsel stated:

> "He [Waxton] . . . stated to me that he desired to plead guilty to the same thing Mr. Tucker had pled guilty to and stated that he had—that he was not any more guilty of anything than was the defendant Mr. Tucker, and that he did not feel that it was fair or right for Tucker to be given an opportunity to plead guilty without his having been afforded the same opportunity. . . .
> "[I]t does appear to me that there would be a basic injustice and inequality in the light of the evidence which has been heretofore presented, and accepting for the moment without admitting that testimony of the defendant Tucker is true in all respects, in the light that it does not appear to me that the defendant Waxton could not legally be guilty of any offense greater than any offense for which the defendant Tucker is allegedly guilty, and therefore to accept such pleas as have been accepted from the defendant Tucker . . . [and not to afford] the defendant Waxton the same opportunity and. . . the same type of pleas . . . produces an inequality and unjust results which I believe our law does not contemplate. I would have to say in all honesty and candor, in light of the evidence that we have heard up to this point, it would seem to me to be most unjust and inequitable to the defendant Waxton to be subjected to a punishment greater than that to which defendant Tucker might be subjected under his pleas, if the defendant Waxton, wanted to tender the same kind of guilty pleas which the defendant Tucker tendered, and Mr. Waxton tells me that he does want to tender such plea."

being entered in his case as is Sammy Stephenson or Max McLeod until this morning. [*sic*]

"MR. McCORMICK. I did not offer you one did I.

"MR. TWISDALE: No, sir, but I said I had the same impression.

"COURT: Motions for mistrial are denied and again I'm going to let the record stand for itself on the happening up until now." (R. 70–71.)

(R. 83, 84–85.) Petitioner Waxton was examined by the trial court concerning his comprehension of the tender and his desire to enter pleas of guilty. (R. 86.) The solicitor, however, declared simply, "I cannot accept the pleas" (R. 87); and the trial continued.

Petitioner Waxton testified in his defense, giving an account of the robbery that was basically similar to the accounts given by Tucker and Carroll. He said, however, that he had punched Woodson in the eye because Woodson owed him $3.00 and had declared, "I don't have anything," when Waxton came for the money. (R. 88–89.) He also testified that he had never owned a handgun; that he did not have a pistol that night; that Tucker carried a pistol in his pocket; and that Tucker shot Mrs. Butler and Mr. Stancil. (R. 89, 90.) [16]

> "Planning of the robbery began in the trailer park. All of us were giving suggestions of what to do. Tyrone gave suggestions. On June 3 we all of a sudden came together to rob the store. We all had been talking about it. I am referring to James Tyrone Woodson, Johnnie Lee Carroll, Leonard Maurice Tucker and myself. We had talked earlier about robbing another E–Z Shop on Cumberland Street but then decided not to rob it after someone

[16] Waxton's testimony on direct examination appears to imply that it was Woodson's idea to test-fire the rifle before the robbery. (R. 89.) On cross-examination, he stated that "Tucker suggested that Woodson test-fire the rifle" (R. 92), but he subsequently testified that he was not sure which of the other men had made the suggestion (R. 97).

made the remark there were too many customers coming in and out of that one." [17]

(R. 94–95.) On the evening of June 3, 1974, "[w]hen Tucker got to my trailer, he said, 'Are you ready to go?' and I said, 'Yes, I'm ready.' We all four agreed we were ready." (R. 89.) Petitioner Waxton denied forcing anyone to participate in the robbery (R. 92–93; see also R. 89), and he declared that the four of them divided the proceeds of the robbery equally (R. 93).

Petitioner Woodson also took the stand and gave his account of the robbery. He "became addicted to hard drugs," in Newark, New Jersey, broke the habit, and then went to North Carolina with Waxton to try to escape its recurrence. (R. 98–99.)

> "Waxton had mentioned the robbery to me on the morning before the robbery. I never agreed to go along. When he brought the subject up I would not say anything. I thought it was crazy from the beginning.
>
> "Most of that day (June 3) Tucker and I stayed together. We made two trips to the store to buy wine. We drank. We discussed the proposed robbery by Luby. Tucker said Waxton had mentioned it to him too. I told Tucker I wasn't going to be in no robbery and he said the same thing."

(R. 99.) Later that evening, Waxton came to Woodson's trailer:

> "[h]e said, 'Look at you, you are drunk.' Well he cursed, he said, 'M.... F...., look at you, you are drunk,' and I said, 'So what,' and he said, 'So what, you are drunk.' Just like that. And I said, 'So

[17] Waxton testified that, "[a]ll four of us talked about it [the robbery] and planned it in advance because Johnnie Lee [Carroll] and Tyrone [Woodson] were unemployed. They said they wanted money so they were going to pull a job. I said, 'Why not?'" (R. 91; see also R. 94.)

> what, I am not going nowhere, and that is when he hit me. I grabbed my eye and I fell up against the trailer and then I went down. I never hit him. He did not hit me again. He said 'If I don't kill you M..... F....., Tucker will.' 'Come on and let's go.'"

(R. 100.) Woodson took the rifle from Tucker and entered the car: "[n]o one forced me in the car. I didn't want to go but, just put it this way, I was scared, after being punched in the face and threatened in a kind of way." (*Ibid.*)[18] He did not recall any test-firing of the rifle. (*Ibid.*) While sitting in the car with Carroll outside the store, he "was laying back with the towel over my eye." (R. 100.) He heard one shot. Then Tucker came running out. (R. 101.) Woodson saw Mr. Stancil enter the store but made no effort to stop him. He heard another shot, and Waxton rushed out with paper money in his hand. (*Ibid.*) After they returned to Carroll's and Waxton's mother's house, there was no division of the money; he saw Waxton give his mother "something that was sparkling." (*Ibid.*) (He had "previously seen Waxton with a .22 Derringer, nickelplated, pearl handle.") (*Ibid.*) Later that night, when Woodson and Waxton were alone,

> "[w]e turned on the T. V. and I just turned around and started to mention about him shooting the woman but the woman was the last word I got out of my mouth before he had turned around and hit

[18] He later testified on cross-examination: "I got in the car of my own free will, I knew there was going to be a robbery, and I knew we were going to the place. . . . No one was keeping me in the car. . . ." (R. 105.) His principal reason for accompanying the others, first away from his own trailer and then in the car, was that the woman with whom he was living was upset over seeing him struck by Waxton, and was "screaming and hollering"; and, "not knowing what she might have done," he "didn't want her to get hurt over me in any kind of way." (R. 100.)

> me in the other eye, and blood started coming out of my nose so I just got up and staggered to the bathroom and washed my face, you know, and went and laid across the bed; and after he hit me he told me never in my life to mention that woman's name again ever. Said he did not want to hear no more about what happened."

(R. 101–102.) Petitioner Woodson introduced a signed statement he had given to the police on June 16, 1974. (R. 108–114.) Two police officers testified without contradiction that Woodson was the first of the four men to tell the investigating officers about the robbery and to implicate the others. (R. 38, 56; see also R. 51, 126.)

The trial court instructed the jury that it could find petitioners guilty or not guilty of first degree murder (R. 142–143, 145), and guilty or not guilty of armed robbery (R. 143–144, 145–146), and that it could find petitioner Waxton guilty or not guilty of assault with a deadly weapon with intent to kill (R. 144), or guilty of the lesser included offense of assault with a deadly weapon inflicting serious injury (R. 144–145).

Because the State had proceeded on the theory that Petitioner Woodson was an aider and abettor in the robbery,[19] the court instructed the jury that "you cannot find Tyrone Woodson guilty of an offense unless you have also found Luby Waxton guilty of that offense, the same offense" (R. 145; see also R. 123–134, 142–143). The court further charged that the jury might find petitioner

[19] "The State proceeds on the theory in this case that the defendant Waxton committed murder or killed Mrs. Butler while in the perpetration of a robbery of the place of business where she worked and that he is thereby guilty of murder in the first degree, and it contends that the defendant Woodson was an aider and abettor in the robbery being committed and that murder having been committed in the perpetration of a robbery and he being an aider and abettor, then he is guilty of murder in the first degree equally with the defendant Waxton." (R. 120–121.)

Woodson not guilty of any offense if it found that he had committed otherwise criminal acts under coercion and duress.[20] It instructed the jury that first degree murder "is punishable by death." (R. 120.)

The jury found both petitioners guilty of first degree murder and armed robbery (R. 147–148, 149), and it found petitioner Waxton guilty of assault with a deadly weapon with intent to kill. (R. 150.) Petitioners were sentenced to death upon the murder convictions. (R.

[20] "So, recognizing that the State must prove beyond a reasonable doubt that the conduct of Woodson was willfully, that is of his own free will, he did acts which constituted violations of the law with which he is charged, if you believe that he was under a well-founded fear of death or serious bodily harm, immediate, eminent [*sic*] and impending at the hands of Luby Waxton such as to cause him to go when he would not have gone to render assistance or be ready to render assistance when he would not have otherwise done so in the commission of an armed robbery, then under those circumstances Woodson would not be guilty of the armed robbery because he would not have acted of his own free will and willfully; but mere persuasion by another person or a lack of strong will or fear of slight or remote injury is not enough to excuse a criminal act.

"The defendant Woodson contends that he was coerced by reason of all the background and circumstances of his knowledge of Waxton, his authority over him and his power, the assault on him on this day and knowledge of other assaults that he had committed, that he reasonably apprehended eminent [*sic*] danger of death or great bodily harm at Waxton's hands if he did not go along and take whatever part he took, and under those circumstances he contends he was coerced and was not guilty of either robbery or any killing which might have resulted from the robbery.

"The defendant Woodson contends that at most he was merely present. As I read to you earlier in the law, members of the jury, mere presence at the scene of a crime does not constitute aiding and abetting, and a person may be present even though a criminal act is taking place and do nothing to prevent it without being guilty of the offense charged, but if his presence under all the circumstances is a communication to the other person of his readiness and willingness to assist if needed, under those circumstances he may be an aider and abettor." (R. 139–140.)

148–149, 154–155.) On June 26, 1975, the Supreme Court of North Carolina affirmed those convictions and petitioners' death sentences.

HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND DECIDED BELOW

Petitioners' pretrial motions to quash and dismiss the indictment charging them with murder on the ground that "GS 14–17 as presently written violates the Eighth and Fourteenth Amendments to the Constitution of the United States" because it authorizes the death penalty for first degree murder (R. 19; see also R. 20, 25), were denied (R. 20, 25). Postjudgment motions by petitioners to arrest judgment, based on this ground (R. 151–153), were also denied (R. 152). These rulings were assigned by petitioners as error on appeal (R. 160–164), and the Supreme Court of North Carolina succinctly rejected petitioners' claims, *State* v. *Woodson and Waxton*, 287 N. C. 578, 215 S. E. 2d 607, 615 (1975).

SUMMARY OF ARGUMENT

I.

North Carolina's 1974 legislation ostensibly makes the death penalty "mandatory" for first degree murder and first degree rape. But the State's procedures in capital cases involve numerous uncontrolled discretionary judgments which function to select certain capital offenders for death and to cull other equally guilty defendants for lesser sentences.[21] The broad scope of felony-murder liability makes it particularly likely that prosecutors' unfettered charging and plea-bargaining discretion will result in the capricious visitation of the death penalty upon a random handful of defendants. Statutory provisions

[21] These procedures are demonstrated in the Brief for Petitioner in *Fowler* v. *North Carolina*, No. 73-7031, at 41–101, and we do not repeat that demonstation in the present brief.

ratifying procedures established by the North Carolina Supreme Court assure that jurors trying capital cases will know the penalty consequences of their guilt verdicts and thereby invite the exercise of sentencing discretion through the forms of guilt and degree-of-guilt determinations. As administered in such a system, the death penalty continues to be inflicted arbitrarily in violation of the command of *Furman* v. *Georgia*, 408 U. S. 238 (1972).

II.[22]

The perpetuation of arbitrariness in post-*Furman* capital punishment schemes is not mere happenstance. The death penalty is too cruelly intolerable for our society to apply it regularly and even-handedly; and it is inherently too purposeless and irrational to be applied selectively on any reasoned, noninvidious basis. None of the justifications advanced to support the cruelty of killing a random smattering of prisoners annually survives examination in the light of the realities of this insensate lottery; and none begins, of course, to justify the killing of any particular human being while his indistinguishable counterparts are spared in numbers that attest to our collective abhorrence of what we are doing to an outcast few.

ARGUMENT

I.

INTRODUCTION

Slightly more than a year after the decision of the Supreme Court of North Carolina in *State* v. *Waddell*, 282 N. C. 431, 194 S. E. 2d 19 (1973),[23] the North Caro-

[22] This point incorporates by reference the submissions made in petitioners' briefs in *Fowler* v. *North Carolina*, No. 73-7031, and *Jurek* v. *Texas*, No. 75-5394.

[23] The court in *Waddell* had considered the effect of this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972), upon North Carolina's pre-*Furman* capital procedure. At that time, a discretionary death penalty was authorized as the punishment for first

lina Legislature enacted N. C. Sess. Laws 1973, c. 1201, § 1 (2d Sess., 1974),[24] amending N. C. Gen. Stat. § 14–17 to provide:

"A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison." [25]

Following the lead of *Waddell*, this legislation excises the recommendation-of-mercy provision from the former statute fixing death as the punishment for first-degree murder. It makes a few other substantive changes,[26] but

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degree murder, N. C. Gen. Stat. §14–17 (repl. vol. 1969); rape, N. C. Gen. Stat. § 14–21 (repl. vol. 1969); first degree burglary, N. C. Gen. Stat. § 14–52 (repl. vol. 1969); and arson, N. C. Gen. Stat. § 14–58 (repl. vol. 1969). Appellant Waddell had been condemned for rape under N. C. Gen. Stat. § 14–21 (repl. vol. 1969), which provided:

"[e]very person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

A majority of the North Carolina Supreme Court held that *Furman* invalidated *only* the mercy proviso ("if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life"); and it ruled that thenceforth the death penalty would be "mandatory" upon a conviction for first degree murder, rape, first degree burglary and arson. *State* v. *Waddell*, *supra*, 194 S. E. 2d, at 28. Capital cases in North Carolina were governed by *Waddell* from January 18, 1973 (the date of the decision), until April 8, 1974, when N. C. Sess. Laws, c. 1201, took effect. The Court has granted certiorari to consider the constitutionality of a death sentence imposed during this period in *Fowler* v. *North Carolina*, No. 73–7031.

[24] Section 2 of c. 1201 enacted a new capital crime, "first degree rape," amending § 14–21:

"Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally knows and abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:

"(a) First-Degree Rape—

"(1) If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or

"(2) If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her, the punishment shall be death.

"(b) Second-Degree Rape—Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court."

Other sections of the 1974 legislation repealed the death penalty for first degree burglary (§ 3, c. 1201) and arson (§ 4, c. 1201).

[25] North Carolina General Statutes § 14–17 previously provided:

"A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison." N. C. Gen. Stat. § 14–17 (repl. vol. 1969).

[26] The new legislation also added the crime of kidnapping as a predicate felony for first degree felony murder, increased the possible sentence for second degree murder from two-to-thirty years to two-

essentially leaves North Carolina's death penalty for first degree murder just as it was under *Waddell*. No alterations were made in North Carolina procedures for the administration of the penalty.

The Court has before it in the Brief for Petitioner in *Fowler* v. *North Carolina*, No. 73–7031 [hereafter cited as Petitioner's *Fowler* Brief] a lengthy analysis of the North Carolina law and procedure as it was before, and remains after, the 1974 statute. That analysis demonstrates how a series of uncontrolled discretionary judgments by prosecutors, trial judges, jurors and governors operates to spare the lives of some "capital" defendants while others in indistinguishable circumstances are arbitrarily condemned to die. We will not burden the Court by repeating that discussion here. We merely note that it is fully applicable and contains the submission which we make on behalf of petitioners James Tyrone Woodson and Luby Waxton, subject to the few additions which follows.

II.

THE ARBITRARY INFLICTION OF DEATH

Two points should be added to Part II of Petitioner's *Fowler* Brief, at 26–101:

A. *"Mandatory" Death and Jury Clemency*

In *State* v. *Britt*, 285 N. C. 256, 204 S. E. 2d 817, 828 (1974), the Supreme Court of North Carolina ruled that defense counsel must be allowed to "inform" the jury of the "consequence" of a first degree murder verdict. During jury selection, both defense counsel and the prosecutor may "examin[e] [all prospective jurors] concerning their attitudes toward capital punishment." *Id.*, at 828.

"'[I]n order "to keep the trial on an even keel"

years-to-life imprisonment, and made a minor verbal alteration in § 14–17. See N. C. Sess. Laws 1973, c. 1201 § 1.

> and to insure complete fairness to all parties . . .' . . . . if the trial judge observes that the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence, in our opinion, sufficient compelling reason exists to justify his informing the jury of the consequence of their possible verdicts."

(*Ibid.*). Furthermore, while counsel is not allowed to "argue" punishment in his summation to the jury, "[c]ounsel may . . . *in any case*, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged." *Id.*, at 829. Failure to inform the jury of the penalty imposed pursuant to a first degree murder conviction is reversible error under the *Britt* decision. See *State* v. *Anthony Carey*, 285 N. C. 497, 206 S. E. 2d 213 (1974); *State* v. *Albert Carey*, 285 N. C. 509, 206 S. E. 2d 222 (1974); *State* v. *Bell*, 287 N. C. 248, 214 S. E. 2d 53 (1974).

The North Carolina Legislature has now codified the *Britt* rules, providing that defense counsel may inform veniremen on *voir dire* that a death penalty will be imposed upon the return of a verdict of guilty to a capital crime (N. C. Gen. Stat. § 15–176.3 (repl. vol. 1975)); that he may request the trial judge to instruct the jury that the death penalty will be imposed upon the return of a verdict of guilty to a capital crime (N. C. Gen. Stat. § 15–176.4 (repl. vol. 1975)); and that he may in closing argument in a capital case "indicate the consequences of a verdict of guilty." (N. C. Gen. Stat. § 15–176.5 (repl. vol. 1975)).

Manifestly, the purpose and effect of insuring that the jury knows the fatal consequences of a first degree murder conviction are to invite jurors to avoid those consequences in a "deserving" or sympathetic case. The extent of a North Carolina jury's power to respond to the invitation is documented in Petitioner's *Fowler* Brief,

at 62–95; and the well-known historical fact of jury nullification of "mandatory" death penalty laws in and outside of North Carolina is noted in *id.*, at 67–68, 81, 90–92, n. 133. Theoretically, of course, a North Carolina jury now has no sentencing role; and since its clear duty under North Carolina's "mandatory" punishment legislation is to find the facts without regard to the consequences of its verdict,[27] the sentencing information given it by *Britt* and *Britt*'s statutory codification is theoretically irrelevant. But North Carolina has not been able to follow the theory that far in the face of the realities. Both its judicial and its legislative branches have assiduously protected a "legal syste[m] that permit[s] this unique penalty to be . . . wantonly and . . . freakishly imposed" [28] through the exercise of *ad hoc* capital sentencing discretion by juries.

B. *"Mandatory" Death and Felony Murder*

Petitioners' jury was instructed on first degree felony murder whereas Jesse Thurman Fowler's jury was instructed on first degree premeditated and deliberated murder.[29] This difference is of no constitutional significance, as we shall see.

Under N. C. Gen. Stat. § 14–17, "a homicide is murder in the first degree if it results from the commission or attempted commission of one of the four specified felonies or of any other felony inherently dangerous to life, without regard to whether the death be intended or not." *State* v. *Streeton*, 231 N. C. 301, 56 S. E. 2d 649, 652

[27] See, *e. g.*, *State* v. *Little*, 228 N. C. 417, 45 S. E. 2d 542, 545 (1947); *State* v. *Hawley*, 229 N. C. 167, 48 S. E. 2d 35, 36–37 (1948); *State* v. *Davis*, 238 N. C. 252, 87 S. E. 2d 630, 631 (1953).

[28] *Furman* v. *Georgia*, *supra*, 408 U. S., at 310 (concurring opinion of MR. JUSTICE STEWART).

[29] The distinction between these two kinds of first degree murder is more apparent than real for, as we shall see, a jury is often instructed on both theories.

(1949).[30] As in most States, if a homicide is committed in the perpetration of a felony, "the State is not put to the proof of premeditation and deliberation inasmuch as the law presumes premeditation and deliberation." *State* v. *Bunton*, 247 N. C. 510, 101 S. E. 2d 454, 457 (1958). See also *State* v. *Fox*, 277 N. C. 1, 175 S. E. 2d 561, 571 (1970); *State* v. *Maynard*, 247 N. C. 462, 101 S. E. 2d 340, 345 (1958); *State* v. *King*, 226 N. C. 241, 37 S. E. 2d 684, 686 (1946). Even an accidental killing is first degree murder if committed during the commission of a felony, *State* v. *Thompson*, 280 N. C. 202, 185 S. E. 2d 666, 673–674 (1972); *State* v. *Phillips*, 264 N. C. 508, 142 S. E. 2d 337, 339 (1965) (dictum), and the State need establish no *mens rea* other than that required for the predicate felony itself:

> "'[i]t is not necessary . . . to show that the killing was intended or even that the act resulting in death was intended. It may have been quite unexpected.' [citing Perkins Criminal Law 35 (1957)] . . . . 'The turpitude of the felonious act is deemed to supply the element of deliberations or design to effect death.' 40 Am. Jur. 2d Homicide § 46, at 336."

State v. *Thompson*, *supra*, 185 S. E. 2d, at 673–674.

Moreover, felony-murder liability extends to all those who took part in the commission of the felony, whether by conspiring to commit the crime, being present at the scene of the crime with an intention and a capacity to assist if necessary, wielding the fatal weapon, or facilitating an escape from the scene of the crime:

> "defendant argues that since he did not actively participate in the armed robbery attempt he is not criminally responsible for the murder committed in that attempt.
>
> . . . . .

[30] See p. 21, n. 26, *supra*.

"'Those who enter into a conspiracy to violate the criminal laws thereby forfeit their independence, and jeopardize their liberty, for, by agreeing with another or others to engage in an unlawful enterprise, they thereby place their safety and freedom in the hands of each and every member of the conspiracy.' . . .

"'The felony-murder rule applies whenever a conspirator kills another person in the course of committing a felony, as against the contention that the killing was not part of the conspiracy. If the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence, which may result in the taking of life unlawfully, *every party* to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design.'"

State v. *Carey*, 285 N. C. 497, 206 S. E. 2d 213, 218 (1974) (emphasis in original). See also *State* v. *Kelly*, 243 N. C. 177, 90 S. E. 2d 241, 244 (1955); *State* v. *Smith*, 221 N. C. 400, 20 S. E. 2d 360, 363–364 (1942); *State* v. *Williams*, 216 N. C. 446, 5 S. E. 2d 314, 315 (1939). "[W]hen a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree." *State* v. *Fox*, *supra*, 175 S. E. 2d, at 571.

The broad scope of potential capital liability thus created has frequently been criticized by courts[31] and

[31] In *People* v. *Phillips*, 64 Cal. 2d 574, 51 Cal. Rptr. 225, 414 P. 2d 353 (1966), the California Supreme Court termed the doctrine a "highly artificial concept that deserves no extension beyond its required application." 414 P. 2d, at 360. The court noted:

"The felony murder doctrine has been censured not only because it artificially imposes malice as to one crime because of defendant's commission of another but because it anachronistically resurrects from a bygone age a 'barbaric' concept that has been discarded in the place of its origin. 'Some writers describe the concept as barbaric and urge its abolition or strict limitation.'" 414 P. 2d, at 360 n. 6.

Cf. Commonwealth ex rel. Smith v. *Myers*, 438 Pa. 218, 261 A. 2d 550, 554 (1970):

"the rule has evoked bitter comment referring to it as 'a hold-over from the days of our barbarian Anglo-Saxon ancestors of pre-Norman days, [having] very little right to existence in modern society.'"

The Kentucky Supreme Court explained the derivation of the doctrine:

"If the crime intended was a felony, as at common law practically all felonies were punishable with death, either with or without benefit of clergy, the felonious intent of the intended crime was imputed to the committed act, and, if it were homicide, made it murder; for it was considered immaterial whether a man was hanged for one felony or another."

Powers v. *Commonwealth*, 110 Ky. 386, 413, 61 S. W. 735, 742 (1901). See also *People* v. *Enoch*, 13 Wend. 159, 174 (N. Y. 1834). For a description of the history here referred to, see 4 Blackstone, Commentaries on the Laws of England *200–201 (1st ed. 1769)); 3 Stephen, A History of the Criminal Law of England 21–38 (1883); Moesel, A Survey of Felony Murder, 28 Temple L. Q. 453 (1955); Crum, Causal Relations in the Felony Murder Rule, 1952 Wash. U. L. Q. 191.

"The common law felony-murder rule . . . has been subjected to some harsh criticism, most of it thoroughly warranted. It has been said to be 'highly punitive and objectionable as imposing the consequences of murder upon a death wholly unintended.'"

Commonwealth ex rel. Smith v. *Myers*, *supra*, 271 A. 2d, at 553. See also *Commonwealth* v. *Redline*, 391 Pa. 486, 137 A. 2d 472 (1958).

"The felony-murder rule has been criticized on the grounds that in almost all cases in which it is applied it is unnecessary and that it erodes the relation between criminal liability and moral culpability."

People v. *Washington*, 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P. 2d 130, 134 (1965). *Cf. Commonwealth ex rel. Smith* v. *Myers*, 438 Pa. 218, 261 A. 2d 550, 554 (1970).

commentators who have analyzed the ambiguous origins and contradictory rationale of the doctrine[32] and the unpredictable criminal liability it often imposes. It is

[32] See, *e. g.*, Note, Felony Murder as a First Degree Offense: An Anachronism Retained, 66 Yale L. J. 427 (1957); Stephens, A His-

within this context that a number of critical decisions must be made at different points in the criminal justice system to determine which putative capital defendants will live and which will die.

1. *Prosecutorial Charging Discretion*

The Wickersham Commission's observation that "[t]he Prosecutor [is] the real arbiter of what laws shall be enforced and against whom" [33] is dramatically exemplified in felony murder cases. For the prosecutor's power to negotiate guilty pleas (p. 32, *infra*) is not the

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tory of the Criminal Law of England 57, 74–76 (1883); Moreland, A Re-examination of the Law of Homicide, 59 Ky. L. J. 788, 803 (1971); Packer, Criminal Code Revision, 23 U. Toronto L. J. 1, 3–4 (1973); Holmes, The Common Law 57–58 (1881); Morris, The Felon's Responsibility for the Lethal Acts of Others, 105 U. Pa. L. Rev. 50, 59 (1956); Perkins, Malice Aforethought, 43 Yale L. J. 537, 558–560 (1934). *Cf.* Stroud, Mens REA 170–171, 173 (1914):

"The principle of constructive homicide . . . may be shortly stated to be that the *mens rea* necessary to support a conviction of murder . . . need not consist of any form of homicidal intentionality but may be a culpable intent to commit some other crime, which other crime need not even be an offense against the person, provided that . . . to support a conviction of constructive murder, the *mens rea* must have been felonious.

. . . . . .

"It is curious that such a harsh anomaly as the doctrine of constructive crime should be confined to that particular case where its application is calculated to work the greatest possible hardship, involving, upon a charge of murder, the infliction of the capital sentence for a mere attempt to commit a felony less than homicide."

And see LaFave & Scott, Criminal Law 560 (1972);

"The rationale of the doctrine is that one who commits a felony is a bad person with a bad state of mind, and he has caused a bad result so that we should not worry too much about the fact that the fatal result he accomplished was quite different and a good deal worse than the bad result he intended. Yet it is a general principle of criminal law that one is not ordinarily criminally liable for bad results which differ greatly from intended results."

[33] National Commission on Law Observance and Enforcement, Report on Prosecution 19 (1931).

only arbitrarily selective process at work in the winnowing of felony-murder defendants for the few thought fit to die. The prosecutor may also proceed to trial on a second degree murder charge, even though the State contends that the homicide was committed during the course of a felony.

In *State* v. *Blackwelder*, 182 N. C. 899, 109 S. E. 644 (1921), for example, where the appellant had been convicted of second degree murder "the state contended [at trial] that Blackwelder and McDaniel, in the presence of the deceased, had broken and entered into his garage with intent to steal his car, and were therefore guilty of a felony." 109 S. E., at 646.[34] However, "[w]hen the case was called for trial, the solicitor announced that he would not request a verdict for murder in the first degree, but only for murder in the second degree, or for manslaughter." [35] Although there was no way for the solicitor to rationalize his decision to prosecute a felony-murder case as second degree murder, the Supreme Court of North Carolina affirmed the conviction, remarking that "[t]here was evidence tending to support each of the theories referred to." 109 S. E., at 647.[36] The point

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[34] "The state contended that Blackwelder, McDaniel, and Jones had gone in a car from Concord to the residence of the deceased for the purpose of committing larceny of the car which the deceased had locked in his garage; that Jones drove the car and that Blackwelder and McDaniel got out of the car when it stopped in front of the garage, broke the door, and were in the act of taking the car away when they were frightened by the deceased."

State v. *Blackwelder*, *supra*, 109 S. E., at 645.

[35] 109 S. E., at 644. See Petitioner's *Fowler* Brief, at pp. 45–53, for a discussion of the prosecutor's charging power in North Carolina.

[36] The appellant contended that the deceased had fired the first shot, and that the fatal shots had been returned in self defense. *State* v. *Blackwelder*, *supra*, 109 S. E., at 646. Although the North Carolina Supreme Court held that there was evidence to support both the prosecutor's and the appellant's theory of the slaying (and under appellant's theory, a charge of second degree murder or man-

here is that the solicitor exercised his unfettered discretion to proceed on an irrational theory of the case in order to secure a non-capital conviction, for, at the time of this trial, North Carolina had a "mandatory" death penalty for first degree murder.[37]

The solicitor's power to *nolle prosequi* cases may also be used arbitrarily in this connection. For example, five open murder indictments, sufficient to charge capital first degree murder, were returned against Albert Carey, Anthony Carey, James C. Mitchell, Harold Givens, and Antonio Dorsey for a June 1973 killing during the course of a service station robbery in Charlotte, North Carolina. The State's evidence, as recounted by the Supreme Court of North Carolina in *State* v. *Anthony Carey*, 285 N. C. 497, 206 S. E. 2d 213, 215–217 (1974), indicated that the two Careys and Dorsey remained in a car parked near the service station, while Mitchell and Givens went inside to rob it. During the course of the robbery, Mitchell shot and killed an attendant. Mitchell was allowed to plead guilty to second degree murder, was sentenced to 30 years imprisonment,[38] and testified against the Careys at their respective trials for first degree murder. Both Careys were convicted and sentenced to death. A *nolle prosequi* was entered against Givens[39] and Dorsey.[40] The Supreme Court of North

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slaughter might be warranted, see p. 35, *infra*), any evidence in mitigation was introduced by the defendant. The State's decision to proceed on only second degree charges was made, of course, before the trial began.

[37] See *State* v. *Hawley*, 229 N. S. 167, 48 S. E. 2d 35 (1948).

[38] *State* v. *James C. Mitchell*, Mecklenburg County Super. Ct. No. 73-CR-61589 (Dec. 17, 1973).

[39] *State* v. *Harold N. Givens*, Mecklenburg County Super. Ct. No. 73-CR-61590 (judgment of nonsuit granted November, 1973); see *State* v. *Albert Lewis Carey, Jr.*, 288 N. C. 254, 218 S. E. 2d 387, 390 (1975).

[40] *State* v. *Antonio Dorsey*, Mecklenburg County Super. Ct. No. 73-CR-61587 (*nolle prosequi* entered December 19, 1974).

Carolina reversed the convictions and death sentences of the two Careys under *State* v. *Britt*, 285 N. C. 256, 204 S. E. 2d 817 (1974), see pp. 22–24, *supra*, because the trial courts had refused to let defense counsel inform the respective juries that death was the punishment for first degree murder. *State* v. *Anthony Carey*, *supra*; *State* v. *Albert Carey*, 285 N. C. 500, 206 S. E. 2d 222 (1974). Albert Carey was retried and was again convicted of first degree murder and sentenced to death;[41] his conviction and sentence were affirmed on appeal. *State* v. *Carey*, 288 N. C. 254, 218 S. E. 2d 387 (1975).[42] Anthony Carey was not retried a second time, however, and the State entered a *nolle prosequi* on December 19, 1974.[43] The reasons for the differing fates of the Careys, Dorsey, Givens, and Mitchell are utterly mystifying in view of their equal culpability under settled doctrines of felony murder. See *State* v. *Fox*, *supra*, 175 S. E. 2d, at 571. Albert Carey's death sentence is truly "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman* v. *Georgia*, 408 U. S. 238, 309 (1972) (concurring opinion of MR. JUSTICE STEWART).[44]

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[41] *State* v. *Albert Carey*, Mecklenburg County Super. Ct. No. 73-CR-46178, 61586 (December 19, 1974).

[42] This conviction and death sentence are now pending in this Court on a petition for certiorari, *Carey* v. *North Carolina*, No. 75-5960.

[43] *State* v. *Anthony Carey*, Mecklenburg County Super. Ct. No. 73-CR-46179.

[44] There are also cases in which one codefendant in a felony murder situation has been indicted for second degree murder, while for inexplicable reasons the other codefendants have been charged by the grand jury with first degree murder. In *State* v. *Maynard*, 247 N. C. 462, 101 S. E. 2d 340 (1958), five defendants were indicted for a robbery murder, but one of them "tendered a plea of guilty of murder in the second degree as charged against her in the indictment, which plea the State accepted." 101 S. E. 2d, at 341. The other four defendants either pleaded guilty to, or were convicted of, first degree murder. (*Ibid.*)

2. *Plea Bargaining*

In both this case and the *Carey* cases, some of the capitally charged defendants were allowed to plead guilty to lesser charges and some were not. The similarity between the cases ends there, however, for in *State* v. *Carey*, 288 N. C. 254, 218 S. E. 2d 387 (1975), the actual slayer (under the State's theory) was allowed to plead guilty, while here this defendant's attempts to enter a plea of noncapital offenses were rebuffed, see page 11, *supra*. It may well be that judgments or impressions as to differing degrees of culpability among codefendants and between felony-murder cases are reflected here. But the stark fact is that these judgments have no basis in the North Carolina law of homicide and are being made on an *ad hoc* footing by different solicitors at different times, pursuant to no common policy and subject to no regular or lawful control. The *legislative* policy of the "mandatory" death penalty applies equally in all of these cases or in none. The Supreme Court of North Carolina succinctly summarized the paradox:

> "[i]t is perfectly clear from the evidence that 'Peanut' Mitchell was guilty of murder in the first degree, although he was later permitted to plead guilty to second degree murder. *State* v. *Fox, supra*, holds in such a situation that all the conspirators are guilty of murder in the first degree."

State v. *Albert Lewis Carey, Jr., supra*, 218 S. E. 2d, at 400. See also *State* v. *Bennett*, 226 N. C. 82, 36 S. E. 2d 708, 709 (1946) (guilty plea to second degree murder allowed for killing committed during robbery of filling station).

3. *Jury Discretion*

The oft-repeated doctrinal statement that upon an indictment charging "murder committed in the perpetration of a robbery, the verdict would be restricted to murder in the first degree or not guilty." *State* v. *Linney*, 212 N. C. 739, 194 S. E. 470, 471 (1938),[45] does not in fact describe the jury's dispensing power in a felony murder case. For a number of reasons, a North Carolina jury has a broad license to spare—or to declare forfeit—the life of a defendant charged with first degree felony murder.[46]

First, the jury may simply choose to convict the defendant of the predicate felony without finding him guilty on the capital first degree murder charge. Where (as in petitioners' case) the jury convicts *both* for the predicate felony and the murder, judgment will be arrested on the former.[47] But sympathetic jurors nevertheless retain the power to convict the defendant only of the nonhomicide offense and spare his life.[48] In *State* v.

[45] See, *e. g.*, *State* v. *Griffin*, 280 N. C. 142, 185 S. E. 2d 149, 151 (1971); *State* v. *Duboise*, 279 N. C. 73, 181 S. E. 2d 393, 397 (1971); *State* v. *Roseman*, 279 N. C. 573, 184 S. E. 2d 289, 294 (1971); *State* v. *Hairston*, 280 N. C. 220, 185 S. E. 2d 633, 642–643 (1972); *State* v. *Bryant*, 280 N. C. 531, 187 S. E. 2d 111, 114 (1972); *State* v. *Bentley*, 223 N. C. 563, 27 S. E. 2d 738, 741 (1943); *State* v. *Doss*, 279 N. C. 413, 183 S. E. 2d 671, 679 (1971).

[46] See generally Petitioner's *Fowler* Brief, at 62–95.

[47] See *State* v. *Moore*, 284 N. C. 485, 202 S. E. 2d 169, 176 (1974); *State* v. *Carroll*, 282 N. C. 326, 193 S. E. 2d 85, 89–90 (1972); *State* v. *Peele*, 281 N. C. 253, 188 S. E. 2d 326, 331–332 (1972).

[48] The extent of this power is determined by an antecedent exercise of discretion by the prosecutor. In *State* v. *Thompson*, 280 N. C. 202, 185 S. E. 2d 666 (1972), a defendant was charged with first degree murder, felonious breaking and entering, and felonious larceny. The North Carolina Supreme Court ruled that submission of the breaking and entering charge to the jury was proper:

"Although a remote possibility, conceivably the jury could have found beyond a reasonable doubt that defendant feloniously broke into and entered the Mackey apartment but not that defendant shot and killed Ernest Mackey. Under appropriate instructions as to this contingency, it was proper to submit the felonious breaking and entering count in the separate indictment. (Of course there would have been no basis for submitting the felonious breaking and

Rodgers, 216 N. C. 572, 5 S. E. 2d 831 (1939), for example, three defendants were charged with a particularly aggravated felony murder,[49] and their jury was instructed that it could convict them of murder, first degree burglary, conspiracy, second degree burglary, and robbery with firearms. The jury acquitted the defendants of the capital charges (first degree murder and burglary) and convicted them of the three noncapital ones.[50] It must be remembered that most of the predicate felonies for

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entering if defendant had been tried solely on the murder indictment.)"

185 S. E. 2d, at 675.

[49] The Supreme Court of North Carolina detailed the following facts concerning the crime with which defendants were charged:

"The record discloses that Tom Moore, a man about sixty years of age, lived alone in a farm house in Robeson County. Harvey Smith was with him in his home on the night of January 11, 1939. They left the sitting room about 8:30 P. M. and went out the back door to a pump to get a bucket of water. As they were returning with the water, three armed men, Bully Rodgers and Peter Locklear each with a pistol and Wealthy Lowry with a shotgun, crawled from under the corner of the house, covered Moore and Smith with their firearms, told them to hold up their hands, marched them around at the point of their guns and into the house where they tortured Moore by burning his feet in the fire and threatening to kill both of them if they did not tell where Moore's money was. They searched the house, found Moore's pocket book containing $19, which they took and then forced Moore and Smith into an old smokehouse in the yard, locked the door and left them there.

"It took Moore and Smith about twenty-five minutes to get out of the smokehouse, which they did by prising the door off the hinges. Moore was taken into the hospital and died of pneumonia about ten days later."

State v. *Rodgers*, *supra*, 5 S. E. 2d, at 831.

[50] *Cf. State* v. *Glenn*, 22 N. C. App. 6, 205 S. E. 2d 352 (1974), where defendant was charged with the first degree murder of a deputy sheriff during a bank robbery, and with kidnapping, felonious assault with intent to kill, and armed bank robbery. The jury convicted on the latter three counts but "was unable to agree on the charge of murder." *Id.*, at 352.

first degree felony murder are themselves serious offenses carrying heavy penalties, so that conviction on such charges gives the jury an option of sparing the defendant's life while yet assuring his prolonged confinement.

Second, the North Carolina rule that "[i]f there is any evidence, or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial court under appropriate instructions to submit that view to the jury," *State* v. *Spivey*, 151 N. C. 676, 65 S. E. 995, 999 (1909), affords trial judges enormous discretion to charge or not charge lesser offenses. In *State* v. *Knight*, 248 N. C. 384, 103 S. E. 2d 452 (1958), the Supreme Court of North Carolina reversed the first degree murder conviction of a defendant on the ground that erroneous jury instructions were given. The Court noted that "[i]t is manifest that the State's evidence was sufficient to carry the case to the jury on the issue of murder in the first degree and to justify the inference that the deceased was killed by the defendant in an attempt to perpetrate the felony of rape." 103 S. E. 2d, at 454–455. Although the victim had been forcibly removed from her home during the course of a violent struggle and although "she had been cut, beaten, mutilated and killed in a shocking manner," 103 S. E. 2d, at 453, the court ruled that the defendant's confession (stating that he had made sexual overtures to her and that she had "tried to hit him," whereupon he struck her with a poker, 103 S. E. 2d, at 456) was sufficient evidence to require that "the jury be permitted to consider a lesser degree of homicide than murder in the first degree," (*ibid.*). The Court found that this evidence "was sufficient to justify, though not require, the inference of a lower degree of homicide than murder in the first degree." 103 S. E. 2d, at 456–457.

Third, when a trial judge submits lesser-included-offense instructions to the jury with *no* evidentiary support, an ensuing conviction on the unsupported lesser

will nevertheless be affirmed on appeal. "An error on the side of mercy is not reversible. . . ." *State* v. *Fowler*, 151 N. C. 731, 66 S. E. 567 (1909).[51] "[W]hatever the reasoning of the jury, the prisoner has no cause to complain that he was not convicted of the higher offense." *State* v. *Matthews*, 142 N. C. 621, 55 S. E. 342, 344 (1906). In *State* v. *Bentley*, 223 N. C. 563, 27 S. E. 2d 738, 740 (1943), the Supreme Court of North Carolina declared:

> "[i]f we are to understand the appellant to base his demand for discharge merely on the fact that the jury by an act of grace has found him guilty of a minor offense, of which there is no evidence, instead of the more serious offense charged, this is to look a gift horse in the mouth; more especially,

[51] See *State* v. *Rowe*, 155 N. C. 436, 71 S. E. 332, 337 (1911); *State* v. *Vestal*, 283 N. C. 249, 195 S. E. 2d 297, 299–300 (1973); *State* v. *Freeman*, 275 N. C. 662, 170 S. E. 2d 461, 466 (1969). In *State* v. *Quick*, 150 N. C. 820, 64 S. E. 168 (1909), the Court held that the giving of a manslaughter charge in a first degree murder case had been proper:

"[s]uppose the court erroneously submitted to the jury a view of the case not supported by evidence whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the state, and not to him."

See also *State* v. *Jones*, 3 N. C. App. 455, 165 S. E. 2d 36, 39 (1969):

"However, the rule with respect to inconsistent verdicts on different counts in a bill of indictment is succinctly stated in 3 Strong, N. C. Index 2d, Criminal Law, § 124, as follows:

"'It is not required that the verdict be consistent; therefore a verdict of guilty of a lesser degree of the crime when all the evidence points to the graver crime, although illogical and incongruous, or a verdict of guilty on one count and not guilty on the other, when the same acts results in both offenses, will not be disturbed.'"

And cf. *State* v. *Davis*, 214 N. C. 787, 1 S. E. 2d 104, 108 (1939): "a jury is not required to be consistent and mere inconsistency will not invalidate the verdict."

> since the conclusion that there is no evidence must be reached by conceding that all the evidence, including the admission of the defendant, points to a graver crime. Such verdicts occur now and then, despite the efforts of the courts to discourage them. When they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed."

This practice makes a shambles of the notion that the jury is without power to convict of lesser offenses in felony murder cases, for lessers have frequently been submitted in situations where there was no "evidence or . . . any inference [that] can be fairly deduced therefrom, tending to show one of the lower grades of murder." *State* v. *Spivey, supra*, 103 S. E. 2d, at 456. Cf. *State* v. *Blackwelder, supra*. In *State* v. *Bell*, 205 N. C. 225, 171 S. E. 50 (1933), three defendants were convicted of second degree murder, 171 S. E., at 51, in a case where "the homicide was committed in the perpetration of the robbery. . . . It is clear that the attempted robbery and the homicide grew out of the same transaction." (*Ibid.*).[52] The facts of the case[53] reveal a cold-blooded felony

[52] "The case was tried upon the theory that if the defendants conspired to burglarize or to rob the home of George Dryman and a murder was committed by any one of the conspirators in the attempted perpetration of the burglary or robbery, each and all of the defendants would be guilty of the murder. This is a correct proposition of law." *State* v. *Bell, supra*, 171 S. E., at 51.

[53] "The deceased was a farmer eighty-four years of age, living in Macon County with his three maiden daughters. It was known that he kept a sum of money, which later proved to be about $2,300, in a trunk in his house. The defendants conceived the idea of robbing the old man of his money, so on the night of January 23, 1933, they first went to the home of Ernest Stamey and there masked themselves. They then got in Robert Bell's car and were driven to a point near the Dryman home. Here, the other defendants left the car with the understanding that Robert Bell should drive down

murder, yet the North Carolina Supreme Court found no error [54] in the submission of the second degree murder charge.[55] See also *State* v. *Streeton*, 231 N. C. 301, 56 S. E. 2d 649 (1949) (defendant convicted of first degree murder for a killing in the course of a kidnapping; jury was instructed on both second degree murder and manslaughter, 56 S. E. 2d, at 651); *State* v. *Alston*, 215 N. C. 713, 3 S. E. 2d 11, 12–13 (1939) (manslaughter instruction given where defendant killed 103 year old woman during robbery).

Fourth, as noted in Petitioner's *Fowler* Brief, at pp. 79–80, a North Carolina jury has the statutory power in felony cases to find a defendant guilty of either an attempt to commit the crime charged in the indictment or an assault with intent to commit that crime.

Finally, the jury may nullify the death penalty by simply refusing to convict in sympathetic cases. As this Court noted in *McGautha* v. *California*, 402 U. S. 183 (1971), there was a "rebellion against the common-law

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the Georgia road and wait there for his confederates and pick them up after they had accomplished the robbery.

"In attempting to perpetuate the robbery, one of the conspirators struck George Dryman over the head with a board, inflicting injuries from which he died about three weeks later. They did not get the money." *State* v. *Bell*, *supra*, 171 S. E., at 50–51.

[54] Defendants Bell's conviction was reversed on double jeopardy grounds, however, since he had been acquitted of a burglary charge arising out of this incident before the murder trial. *State* v. *Bell*, *supra*, 171 S. E., at 51–52.

[55] Surprisingly, the North Carolina Supreme Court has cited *Bell* for the proposition that all participants in a felony murder are guilty of *first* degree murder:

"'[W]hen a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree.' [Quoting *State* v. *Fox*, 277 N. C. 1, 175 S. E. 2d 561 (1970).] Accord, *State* v. *Bell*, 205 N. C. 225, 171 S. E. 50 (1933)." *State* v. *Carey*, 285 N. C. 497, 206 S. E. 2d 213, 218–219 (1974).

rule imposing a mandatory death sentence on all convicted murderers," *id.*, at 198, and "jurors on occasion took the law into their own hands in [murder] cases which were [capital] . . . but which nevertheless were clearly inappropriate for the death penalty. In such cases they simply refused to convict of the capital offense," *id.*, at 199. See also *State* v. *Green*, 246 N. C. 717, 100 S. E. 2d 52, 53–54 (1957); *State* v. *Roy*, 233 N. C. 558, 64 S. E. 2d 840, 841 (1951); *State* v. *Webb*, 20 N. C. App. 199, 200 S. E. 2d 840, 841 (1973).

4. *Executive Clemency*

Suffice it to say of the final lottery [56] that in felony murder cases, the judgments which must inevitably be made are particularly subjective:

> "Where two or more persons are charged with the commission of the same capital offense, an occurrence typical in instances of felony murder . . . evaluating the relative guilt of each defendant becomes critical to the clemency outcome. The principle here that the acts of one shall be the acts of all, insofar as it fails to recognize relative degrees of culpability, leaves to the clemency authority the opportunity to inquire into the defendant's personal responsibility and the directness of his participation in the crime. Thus, the clemency authority would desire to know who masterminded the plan, who did the actual killing, what role the defendant played. Was the defendant the driver (in a robbery)? The lookout? Was the agreement among all the 'partners in crime' to kill if necessary? The answers to these questions will aid the clemency authority in judging the relative accountability of the individual

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[56] See generally Brief for Petitioner, *Fowler* v. *North Carolina*, No. 73-7031, at 95–100.

participants, in determining who are less culpable in fact though not in law." [57]

. . . . . .

The various forms of arbitrary selectivity remaining under North Carolina's "mandatory" death penalty procedure insure, for felony murder convicts as for others, that there can and will be no rational basis for determining who lives and who is killed. The North Carolina Supreme Court has said that "since each [of petitioners and their accomplices] admitted he was one of the four who conspired to rob the shop, legally it makes no difference . . . [who] fired the shot" that killed Mrs. Butler. *State* v. *Woodson*, 287 N. C. 578, 215 S. E. 2d 607, 615 (1975). *Legally* it makes no difference. That is, so far as North Carolina's legislated policies for the use of capital punishment go, it makes no difference. Yet, two die—two live; and this Court doubtless will be asked by the respondent and the Government as *amicus curiae* to sustain the death penalty in deference to "legislative judgment." [58] *Whose* judgment was it that *these* petitioners die? Someone's; no one's; there is no answer; the answer is unknowable because the system is so arbitrary. In the end perhaps no one will have made the judgment—certainly, no one will have made it rationally or consistently with any ascertainable penal policy—but petitioners will nonetheless be dead. We submit it is cruel and unusual punishment.

III. *The Excessive Cruelty of Death*

To the submissions made in Part III of Petitioner's *Fowler* Brief, at 102–104, we would add the discussion in Part III of the Brief for Petitioner in *Jurek* v. *Texas*, No. 75–5394. We respectfully hope that the Court will

[57] Note, Executive Clemency in Capital Cases, 39 N. Y. U. L. Rev. 136, 163 (1964).

[58] Brief for the *United States* as *amicus curiae* in *Fowler* v. *North Carolina*, No. 73–7031, at 11.

consent to consider those two briefs in connection with petitioners' case.

CONCLUSION

The penalty of death imposed upon petitioners James Tyrone Woodson and Luby Waxton is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. The judgments of the Supreme Court of North Carolina should therefore be reversed insofar as they affirm their death sentences.

Respectfully submitted,

EDWARD H. McCORMICK
Post Office Box 38
Lillington, North Carolina 27546
W. A. JOHNSON
Post Office Box 146
Lillington, North Carolina 27546
JACK GREENBERG
JAMES M. NABRIT, III
PEGGY C. DAVIS
DAVID E. KENDALL
BILL LANN LEE
10 Columbus Circle
New York, New York 10019
ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305
ADAM STEIN
CHARLES L. BECTON
Chambers, Stein, Ferguson & Becton
157 East Rosemary Street
Chapel Hill, North Carolina 27541
ATTORNEYS FOR PETITIONERS

APPENDIX A

The following North Carolina defendants have been sentenced to death under the procedures established by N. C. Session Laws 1973 (2nd Sess. 1974), c. 1201, § 1, amending N. C. Gen. Stat. § 14–17 (1974 cum. supp.):

1. *Donald Lee Harding* (white) (first degree murder, 3 counts), Iredell County Super. Ct., Nos. 75–CR–9763, 75–CR–9764, 75–CR–9803 (sentenced to death Feb. 6, 1976).
2. *Gregory Cousin* (black) (murder, 2 counts), Cumberland County Super. Ct., Nos. 75–CR–26679, 26689 (sentenced to death, January 28, 1976).
3. *Joseph Seaborn* (black) (first degree murder), Martin County Super. Ct., No. 75–CR–3810 (sentenced to death January 6, 1976).
4. *Frankie Squires* (black) (first degree murder), Martin County Super. Ct., No. 75–CR–3809 (sentenced to death Jan. 16, 1976).
5. *Faye Beatrice Brown* (black) (first degree murder), Martin County Super. Ct., No. 75–CR–3812 (sentenced to death Jan. 16, 1976).
6. *John Newman Montgomery* (white) (first degree rape), Forsythe County Super. Ct., No. 75–CR–28982 (sentenced to death January 16, 1976).
7. *Auduin Brant Jackson* (black) (first degree murder), Wake County Super. Ct., No. 75–CR–32655 (sentenced to death January 14, 1976).
8. *Margie Boykins* (white) (first degree murder), Johnston County Super. Ct., No. 75–CR–10755 (sentenced to death Jan. 2, 1976).
9. *Willie Lee Williams* (black) (first degree murder), New Hanover County Super. Ct., No.
10. *James Vernon Smith* (white) (first degree murder), Stokes County Super. Ct., No. 75–CR–843 (sentenced to death Dec. 27, 1975).
11. *Bobby Bowden* (black) (murder, 2 counts), Cumberland County Super. Ct., Nos. 75–CR–26675, 75–CR–26676 (sentenced to death Dec. 23, 1975).
12. *Charles Young* (black) murder), Blaydon County Super. Ct., No. 75–CR–3811 (sentenced to death Dec. 5, 1975).
13. *Donald Stahfield* (white) (first degree murder), Onslow County Super. Ct., No. 75–CR–14941 (sentenced to death Nov. 21, 1975).

14. *Pernell James Ham* (white) (first degree murder), Onslow County Super. Ct., No. 75–CR–14962 (sentenced to death Nov. 21, 1975).
15. *Michael Anthony May* (black) (first degree murder), Forsythe County Super. Ct., No. 75–CR–8591 (sentenced to death Nov. 19, 1975).
16. *Herman Leroy Riddick* (black) (first degree murder), Pasquotank County Super. Ct., No. 75–CR–1983 (sentenced to death Nov. 14, 1975).
17. *Kim Allen Manuel* (white) (first degree murder), Catawba County Super. Ct., No. 75–CR–6470 (sentenced to death Nov. 7, 1975).
18. *Joe Lewis Harris* (black) (first degree murder), Wake County Super. Ct., Nos. 75–CR–2199, 75–CR–1959, 75–CR–1958, 75–CR–1956 (sentenced to death Nov. 4, 1975).
19. *Nelson Caldwell Montgomery* (black) (first degree murder), Catawba County Super. Ct., No. 75–CR–4302 (sentenced to death Oct. 10, 1975).
20. *Harry F. Hammonds* (black) (first degree murder), Anson County Super. Ct., No. 75–CR–2618 (sentenced to death Sept. 11, 1975).
21. *Gregory James Taylor* (black) (first degree murder), Mecklenburg County Super. Ct., No. 75–CR– (sentenced to death Sept. 11, 1975).
22. *David Earl Locklear* (native American) (first degree murder), Robeson County Super. Ct., No. 75–CR–1274 (sentenced to death Sept. 11, 1975).
23. *William Earl Matthews* (black) (first degree murder), Wilson County Super. Ct., No. 75–CR–2022 (sentenced to death Aug. 28, 1975).
24. *Victor Foust* (black) (first degree murder), Wilson County Super. Ct., No. 75–CR–2025 (sentenced to death Aug. 28, 1975).
25. *James Junior Biggs* (black) (first degree murder), Chowar County Super. Ct., No. 75–CR–1096 (sentenced to death Aug. 27, 1975).
26. *Tamarcus Swift* (black) (first degree murder), Wayne County Super Ct., No. 75–CR–6754 (sentenced to death Aug. 22, 1975).
27. *McKinley Williams* (black) (first degree murder), Halifax County Super. Ct., No. 75–CR–808 (sentenced to death Aug. 6, 1975).

28. *James C. Johnson* (black) (first degree murder), Montgomery County Super. Ct., No. 75-CR-631 (sentenced to death July 25, 1975).
29. *Charles Alvin* ( ) (first degree murder), Montgomery County Super. Ct., No. 75-CR-614 (sentenced to death July 25, 1975).
30. *Willard Warren* (white) (first degree murder), Haywood County Super. Ct., No. 75-CR-1286 (sentenced to death July 12, 1975).
31. *Elzie Lee McCall* (white) (first degree murder), Transylvania County Super. Ct., No. 75-CR-204 (sentenced to death July 11, 1975).
32. *Dewie L. Gray* (black) (first degree rape), Mecklenburg County Super. Ct., No. 75-CR-2774 (sentenced to death June 26, 1975).
33. *Hillary Boyce* (black) (first degree murder), Beaufort County Super. Ct., No. 75-CR-435 (sentenced to death July 26, 1975).
34. *Johnny Lawrence* (black) (first degree murder), Beaufort County Super. Ct., No. 75-CR-436 (sentenced to death June 26, 1975).
35. *George Phifer* (black) (first degree murder), Beaufort County Super. Ct., No. 75-CR-434 (sentenced to death June 26, 1975).
36. *Robert L. Thompson* (black) (first degree rape), Robeson County Super. Ct., No. 75-CR-2180 (sentenced to death June 16, 1975).
37. *Willie McEachin* (black) (first degree rape), Robeson County Super. Ct., No. 75-CR-2366 (sentenced to death June 16, 1975).
38. *Michael Peplinski* (white) (first degree murder), Robeson County Super. Ct., No. 75-CR-1275 (sentendced to Death June 8, 1975).
39. *David Nicholson* (black) (first degree murder), Robeson County Super. Ct., No. 74-CR-18382 (sentenced to death May 19, 1975).
40. *Leroy Richardson* (black) (first degree murder), Robeson County Super Ct., No. 74-CR-18378 (sentenced to death May 19, 1975).
41. *James McEachin* (black) (first degree murder), Robeson County Super Ct., No. 74-CR-18381 (sentenced to death May 19, 1975).

42. *Coleman Covington* (black) (first degree murder), Robeson County Super. Ct., No. 74-CR-18381 (sentenced to death May 19, 1975).
43. *James D. Harrill* (white) (first degree murder), Rutherford County Super. Ct., No. 75-CR-066D (sentenced to death May 16, 1975).
44. *Waymon Harris* (black) (first degree murder), Rockingham County Super. Ct., No. 75-CR-1577C (sentenced to death Apr. 17, 1975).
45. *Sherman Carter* (black) (first degree murder), Mecklenburg County Super. Ct., No. 74-CR-70366 (sentenced to death Apr. 9, 1975).
46. *John T. Alford* (black) (first degree murder), Mecklenburg County Super. Ct., No. 74-CR-70358 (sentenced to death Apr. 9, 1975).
47. *Robert Griffin* (black) (first degree murder), Jones County Super. Ct., No. 74-CR-1511 (sentenced to death Mar. 27, 1975).
48. *Edward Davis* (white) (first degree murder), Buncombe County Super. Ct., No. 74-CR-21567 (sentenced to death Mar. 20, 1975).
49. *Alfred J. Jones* (black) (first degree murder), Lenoir County Super. Ct., No. 75-CR-1032 (sentenced to death Mar. 19, 1975).
50. *Larry A. Waddell* (black) (first degree murder), Mecklenburg County Super. Ct., No. 75-CR-70393 (sentenced to death Mar. 12, 1975).
51. *Willie F. McZorn* (black) (first degree murder), Moore County Super. Ct., No. 75-CR-0576 (sentenced to death Mar. 5, 1975).
52. *D. C. Cawthorne* (black) (first degree murder), Onslow County Super. Ct., No. 75-CR-22418 (sentenced to death Feb. 24, 1975).
53. *Allen Roberts* (black) (first degree rape), Durham County Super. Ct., No. 75-CR-12595 (sentenced to death Feb. 12, 1975).
54. *James Woodson* (black) (first degree murder), Harnett County Super Ct., No. 74-CR-5054 (sentenced to death Dec. 9, 1974).
55. *Luby Waxton* (black) (first degree murder), Chowan County Super. Ct., No. 75-CR-1096 (sentenced to death Dec. 9, 1974).

56. *Joe Lee Cobbs* (native American) (first degree murder), Halifax County Super. Ct., No. 74–CR–4143 (sentenced to death Nov. 24, 1974).
57. *Carl Miller* (black) (first degree rape), Catawba County Super. Ct., No. 74–CR–13135 (sentenced to death Oct. 31, 1974).
58. *Artis McClain* (black) (first degree rape), Catawba County Super. Ct., No. 74–CR–13138 (sentenced to death Oct. 31, 1974).
59. *Larry C. Clark* (black) (first degree rape), Catawba County Super. Ct., No. 74–CR–13140 (sentenced to death Oct. 31, 1974).
60. *Wallace C. Lanford* (black) (first degree murder), Gaston County Super. Ct., No. 74–CR–9539 (sentenced to death Oct. 30, 1974).
61. *Varas B. Shader* (white) (first degree murder), Onslow County Super. Ct., No. 74–CR–15759 (sentenced to death Aug. 18, 1974).
62. *Ted Carter* (white) (first degree murder), Gaston County Super. Ct., No. 74–CR–18028 (sentenced to death Aug. 2, 1974).
63. *Henry A. Tatum* (black) (first degree murder), Durham County Super. Ct., No. 74–16919 (sentenced to death July 21, 1974).